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IN THE

Supreme Court of the United States

October Term, 1957.

No. 316.

HELEN E. COTTRELL,

Appellant,

v.

THE PAWCATUCK COMPANY (formerly the C. B. COTTRELL & SONS COMPANY) a Delaware Corporation (known as the Old Company), HARRIS-SEYBOLD COMPANY, a Delaware Corporation, DONALD C. COTTRELL, RIDLEY WATTS, ARTHUR M. COTTRELL, JR., CHARLES P. COTTRELL, JR., and THE COTTRELL COMPANY, a Delaware Corporation (known as the New Company),

Appellees.

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF.

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IN THE

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OCTOBER TERM, 1957.

No. 316.

HELEN E. COTTRELL,

Appellant,

v.

THE PAWCATUCK COMPANY (FORMERLY THE C. B. COTTRELL & SONS COMPANY), A DELAWARE CORPORATION (KNOWN AS THE OLD COMPANY), HARRIS-SEYBOLD COMPANY, A DELAWARE CORPORATION, DONALD C. COTTRELL, RIDLEY WATTS, ARTHUR M. COTTRELL, JR., CHARLES P. COTTREL, JR., AND THE COTTRELL COMPANY, A DELAWARE CORPORATION (KNOWN AS THE NEW COMPANY),

Appellees.

MOTION TO DISMISS.

Appellees in the above entitled case move to dismiss the appeal on the ground that the Court is without jurisdiction under 28 U. S. C. § 1257(2), or 28 U. S. C. § 1257(3).

OPINIONS BELOW.

The opinion of the Supreme Court of Delaware is reported in 128 A. 2d 225. The opinion of the Court of Chancery of Delaware is reported in 116 A. 2d 787. Copies of the above opinions and judgments thereon are attached to Appellant's Jurisdictional Statement as Appendix A.

QUESTIONS PRESENTED.

1. Since the Supreme Court of Delaware refused to decide the constitutionality of the Delaware statute governing sale of corporate assets because appellant had failed to raise the question in the trial court, does the Supreme Court of the United States have jurisdiction of the case under U. S. C. § 1257(2), on which appellant relies?

2. If this court has no jurisdiction under U. S. C. § 1257(2) and appellant relies on U. S. C. § 2103 under which in certain cases an appeal may be regarded and acted on as a petition for writ of certiorari, does this court then have jurisdiction under U. S. C. § 1257(3), in view of the fact that appellant in the trial court made no claim of right under the United States Constitution and in accordance with prevailing state practice in the State of Delaware, the Supreme Court of that state refused to consider the constitutionality of the Delaware statute in question?

STATEMENT OF THE CASE.

Appellant, a minority stockholder, brought an action in the Court of Chancery of Delaware to enjoin the sale by C. B. Cottrell & Sons Company[1] (Old Company) of its operating assets to Harris-Seybold Company. Appellant did not obtain a restraining order or preliminary injunction preventing consummation of the sale, and on December 10, 1954, the sale was completed. Actually the assets were sold to a wholly-owned subsidiary of Harris-Seybold Company, referred to throughout the proceedings as the New Company.

After the consummation of the sale the case was tried in the Court of Chancery where appellant sought rescission of the contract and restoration of the status quo. Alternatively she sought damages against the directors of the Old

1. Later its name was changed to The Pawcatuck Company.

Company, against Harris-Seybold Company, and against the New Company.

Appellant claimed in the trial court that the assets of the Old Company had been sold for a legally inadequate price and that the directors and majority stockholders had acted in reckless disregard of the rights of minority stockholders by accepting a price grossly disparate to the value of the assets sold. The Chancellor considered each of appellant's arguments on the merits, determined that there had been compliance with both the statutory and equitable pre-requisites of a sale of corporate assets, and ordered the complaint dismissed.

Appellant appealed to the Supreme Court of Delaware, asserting again that the assets of the Old Company had been sold for a legally inadequate price. In accordance with the Delaware practice in sale of assets cases, the Supreme Court reviewed in detail all of the evidence touching on valuation which had been adduced before the Chancellor, and concluded that in determining to sell the assets and in fixing the price thereof the directors and majority stockholders had acted within the reasonable limits of business judgment.

In addition to raising in the Supreme Court of Delaware the contentions which she had made unsuccessfully in the Court of Chancery, appellant advanced for the first time the contention that the 1917 Delaware statute authorizing the sale of all of the assets of a corporation by vote of the majority of the voting shares was unconstitutional if applied to the Old Company, because its charter antedated the statute. This question the Supreme Court of Delaware expressly declined to consider, stating in its opinion (A-31) that it had many times been ruled in Delaware that questions not fairly raised in the court below will not be considered on appeal.

Having found no evidence of illegality in the sale, and having determined that appellant's attempt to raise the

constitutional question came too late, the Supreme Court of Delaware affirmed the judgment of the Court of Chancery.

Appellant then petitioned for reargument as permitted by Delaware practice, urging that the Court should have passed upon the constitutionality of the statute. However, appellant made no contention in her petition for reargument that the refusal of the Court to pass upon the constitutionality of the statute was an unconstitutional deprivation of due process of law and equal protection of the laws in violation of the 14th Amendment of the United States Constitution. The pertinent portions on appellant's petition on this question appear in Appendix 1 of this Motion to Dismiss. Reargument was refused.

Thereafter appellant brought this appeal. In her Jurisdictional Statement [2] appellant contends again, as she did initially in the Supreme Court of Delaware, that 8 Del. C. § 271 is unconstitutional. Moreover, appellant advances for the first time a new contention, namely, that the refusal of the Supreme Court of Delaware to pass upon the constitutionality of 8 Del. C. § 271 was itself an act which unconstitutionally deprived her of due process of law and equal protection of the laws in violation of the 14th Amendment of the United States Constitution.

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2. Referred to herein as J. S.

ARGUMENT.

I.

Under U. S. C. § 1257(2) the Appeal Should Be Dismissed for Lack of Jurisdiction.

U. S. C. § 1257 provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> * * *"

In the trial of this case in the Court of Chancery of Delaware, appellant made no claim that § 271 of the Delaware Corporation Act (8 Del. C. § 271) enacted in 1917 was unconstitutional in its application to the Old Company. That question was raised for the first time in appellant's brief filed in the Supreme Court of the State of Delaware. In accordance with Delaware practice, the court declined to consider that question, on the ground that questions not fairly raised in the court below would not be considered on appeal. It follows, therefore, that the United States Code section above quoted affords no ground for appellant's appeal to the United States Supreme Court because there was no decision in the Supreme Court of Delaware holding the statute in question valid. Whatever may be the reason why there was no decision in the final state court on the constitutional question is immaterial here. Appellant argues at length that in accordance with the practice pre-

vailing in Delaware, the Supreme Court of that state should have passed on the constitutional question and that its failure to do so is itself a denial of appellant's rights under the United States Constitution. These contentions are immaterial so far as jurisdiction to entertain the appeal is concerned. If we are wrong on this point, then reference is made to the next portion of this brief in which we discuss these questions on the basis of considering the appeal as a petition for certiorari.

II.

If the Appeal Is Considered as a Petition for Certiorari, Jurisdiction to Grant the Petition Is Lacking Under U. S. C. § 1257(3) on the Ground That the Claim of Constitutional Rights Were Not "Specially Set Up or Claimed" in the Trial Court.

A. The Constitutionality of the Statute.

The General Principle.

The case of *Memphis Gas Co. v. Beeler*, 315 U. S. 649 (1942) ably expresses the principle of law applicable to the instant case:

> "It is true that when this case reached the Supreme Court of Tennessee the appellant included in its brief, which has been certified as part of the record here, a statement of its legal position which might serve as a challenge to the validity of the statute. But appellant has failed to establish that under Tennessee practice such a contention can be availed of if advanced for the first time in the appellate court, . . ."
>
> ". . . Since it does not appear that the validity of the statute was either drawn in question or passed upon in the trial court or deemed by the state supreme court to be in issue, we must dismiss the appeal for want of jurisdiction. . . ." (315 U. S. at 651)

This principle has found continued favor in the United States Supreme Court from an early date. *Spies v. Illinois*, 123 U. S. 131 (1887); *Erie Railroad Company v. Purdy*, 185 U. S. 148 (1902); *Jacobi v. Alabama*, 187 U. S. 133 (1902); *Layton v. Missouri*, 187 U. S. 356 (1902); *Mutual Life Ins. Co. v. McGrew*, 188 U. S. 291 (1903); *Hulbert v. City of Chicago*, 202 U. S. 275 (1906); *Louisville & Nashville R. R. Company v. Woodford*, 234 U. S. 46 (1914); *Atlantic Coast Line Railroad Company v. Mims*, 242 U. S. 532 (1917); *Pennsylvania Railroad Co. v. Illinois Brick Co.*, 297 U. S. 447 (1936); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U. S. 430 (1940); *Adler v. Board of Education of the City of New York*, 342 U. S. 485 (1952); *Michel v. Louisiana*, 350 U. S. 91 (1955).

In applying the principle as set forth above this Court has consistently accepted the opinion of the highest Court of the state from which the appeal comes in order to determine whether the state practice requires the submission of the question to the trial Court. *Erie Railroad Company v. Purdy*, 185 U. S. 148 (1902); *Layton v. Missouri*, 187 U. S. 356 (1902); *Hartford Life Insurance Company v. Johnson*, 249 U. S. 490 (1919).

The Delaware Practice.

Appellant admits that the question was not raised by her until she filed her first brief in the Delaware Supreme Court (J. S. p. 4). Under the practice prevailing in the State of Delaware this was too late.

Appeals to the Delaware Supreme Court from the Court of Chancery are governed by Article 4, Section 11(4) of the Delaware Constitution which provides:

"Section 11. The Supreme Court shall have jurisdiction as follows:

"(4) To receive appeals from the Court of Chancery and to determine finally all matters of appeal in

the interlocutory or final decrees and other proceedings in chancery."[3]

This constitutional provision was interpreted by the Delaware Supreme Court in the case of *Trout v. Farmers Trust Co. of Newark, et al.*, 19 Del. Ch. 437, 168 A. 208 (1933) to mean that, in order for the Delaware Supreme Court to take jurisdiction of a particular question,

> ". . . it must appear from the record which is sent up to this Court from the Court of Chancery that said question was raised at some stage of the proceedings in the Court of Chancery . . ." (168 A. at p. 209)

The *Trout* decision was specifically followed by the Delaware Supreme Court in *Stephenson v. Commonwealth & Southern Corporation*, 19 Del. Ch. 447, 168 A. 211 (1933) in which the Court said:

> "It is a rule of almost universal application that questions not raised and preserved for review in the trial court will not be considered on appeal. The authorities so holding are so uniform that time will not be taken for the citation of specific cases. See cases cited in 3 C. J. 689; 2 R. C. L. 69; Decennial Digest, Appeal & Error, Key No. 169-171. This was the ruling in Trout v. Farmers Trust Co. of Newark (Del. Ch.), 168 A. 208, recently determined in this court."

Trout was also specifically followed in *Shanik, et al. v. White Sewing Machine Corporation*, 25 Del. Ch. 371, 19 A. 2d 831 (1941); and in *Equitable Trust Co. v. Gallagher*, 32 Del. Ch. 401, 77 A. 2d 548 (1950).

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3. This section was renumbered by an amendment which became effective in 1951, having been formerly Section 12(4), but is otherwise identical except for one word change of no significance.

The principle has been adhered to by the Court in other cases though without specific reference to the *Trout* case:

> *Radio Corporation of America v. Philadelphia Storage Battery Co.*, 23 Del. Ch. 289, 6 A. 2d 329 (1939);
>
> *Darling Apartments Co. v. Springer*, 25 Del. Ch. 420, 22 A. 2d 397, 137 ALR 803 (1947).

It is, therefore, submitted that in the present case the Delaware Supreme Court was correctly announcing the applicable rule of practice when it stated, in declining to consider appellant's contention that the Delaware asset sale statute (8 Del. Code § 271) was unconstitutional if applied to her, that (J. S., A 31)

> "It has been many times ruled in this State that questions not fairly raised in the court below will not be considered on appeal."

In following its own consistent practice the Delaware court was certainly not acting in a spirit of evasion for the purpose of defeating a federal right.

The Rickards Decision.

Appellant's whole argument is based upon certain of the wording in the case of *Rickards v. State*, 45 Del. 573, 77 A. 2d 199 (1950).[4] There are a number of reasons why this case cannot properly be cited as authority for appellant's contention that the Delaware Supreme Court should have considered the federal question. In the first place, it was originaly tried in the Court of General Sessions and was a criminal matter. If an exception to the Delaware practice exists, it is clearly to be confined to criminal actions. This is indicated by the quotation from the decision now ap-

4. Wrongly referred to as *Richards* by appellant (J. S. 11, 12, 13).

pealed from referring to the *Rickards* case and which is included in the jurisdictional statement (J. S. 12). It is also the holding generally when exceptions to the usual rule are made.

3 Am. Jur. 293 (Appeal & Error).
State ex rel. York v. County of Walla Walla, 28 Wash. 2d 891, 184 P. 2d 577, 172 ALR 1001 (1947).
U. S. A. v. Atkinson, 297 U. S. 157 (1936).

Second, as a criminal appeal the *Rickards* case was not necessarily controlled by the *Trout* decision (*supra* p. 8) which had been originally tried on the equity side of Delaware's dual court system. That the Supreme Court considered the *Trout* rule as set out above still binding after it decided *Rickards* is indicated by the fact that *Trout* was cited as authority in *Equitable Trust Co. v. Gallagher* (*supra* p. 8), which was handed down immediately after *Rickards.*

Third, the constitutional question had been brought to the attention of the trial judge in *Rickards.*

Further, the *Rickards* decision was written by Justice Daniel F. Wolcott who was a member of the court which unanimously decided the present case, a definite indication that there exists no inconsistency between *Rickards* and the decision now appealed from.

Appellant's contention that the Delaware Supreme Court has applied "a special rule to her case in conflict with its own pre-existing rule" is without substance. It stems from appellant's misapprehension as to the content of the pre-existing rule. Faced with a similar contention of unconstitutionality in the case of *Darling Apartment Co. v. Springer, supra* p. 9, also an appeal from the Delaware Chancery Court, Chief Justice Layton of the then Delaware Supreme Court gave exactly the same answer as to what the rule was, as did Chief Justice Southerland in the case in

which review is now sought. In *Darling* the appellant sought to urge for the first time in the Delaware Supreme Court that the State Liquor Control Act was unconstitutional in that it made no adequate provision for giving license holders notice of the promulgation of its rules. Chief Justice Layton held this question, not having been raised or considered below, was "not properly before this Court and will not be determined." (22 A. 2d at 400-01).

Thus there is no basis for appellant's contention that the Delaware Supreme Court has made any change in its pre-existing rule.

B. The Alleged Denial of Equal Protection of the Laws as a Result of the Delaware Supreme Court's Decision.

We have already pointed out that the refusal of the Delaware Supreme Court to hear appellant's constitutional argument was consistent with the previous decisions of that court. If we are correct in this, there could have been, of course, no denial of equal protection to appellant.

Even if the decision sought to be reviewed here was inconsistent with that in the *Rickards* case, the failure of appellant to so claim at the time she asked for reargument in the Delaware Supreme Court is sufficient to bar her here from asserting any such right.

White River Lumber Co. v. Arkansas, 279 U. S. 692 (1929).

Whitney v. California, 274 U. S. 357, 362-3 (1927).

Hiawassee River Power Co. v. Carolina-Tennessee Power Co., 252 U. S. 341, 344 (1920).

Thomas v. Iowa, 209 U. S. 258 (1908).

III.

Even if the Court Sees Fit to Consider Appellant's Contention that 8 Del. C. § 271 is Unconstitutional as to a Corporation Whose Charter Antedates the Statute, It is Clear That the Question is Unsubstantial and the Contention Without Merit.

8 Del. C. § 364 was originally enacted in 1901, long before the incorporation of the Old Company in 1914. This section reads as follows:

> "This chapter may be amended or repealed, at the pleasure of the Legislature, but any amendment or repeal shall not take away or impair any remedy against any corporation under this chapter, or its officers, for any liability which shall have been previously incurred. This chapter and all amendments thereof shall be a part of the charter of every corporation except so far as the same are inapplicable and inappropriate to the objects of the corporation."

Thus, under § 364, the provisions of § 271 were specifically incorporated into the charter of the Old Company in 1917. This has been clearly recognized in the Delaware cases.

> *Bay State Gas Co. v. State ex rel. Content,* (Del. Supreme Ct. 1904), 4 Penn. 238, 56 A. 1114 (1904).
>
> *Gow v. Consolidated Coppermines Corporation* (Del. Ct. of Ch. 1933), 19 Del. Ch. 172, 180, 165 A. 136, 139 (1933).
>
> *Davis v. Louisville Gas & Electric Co.* (Del. Ct. of Ch. 1928), 16 Del. Ch. 157, 165, 142 A. 654, 658 (1928).

In these cases amendments to the General Corporation Law were held applicable to the charter of previously organized corporations so as to deprive holders of stock which

was outstanding before the amendments of rights which they held at the time of the amendments.

Appellant relies on *Keller v. Wilson & Co.*, 21 Del. Ch. 391, 190 A. 115 (1936), *Consolidated Film Industries, Inc. v. Johnson*, 22 Del. Ch. 407, 197 A. 489 (1937) and *Wessel v. Guantanamo Sugar Co.*, 134 N. J. Eq. 271, 35 A. 2d 215, *aff'd* per curiam, 135 N. J. Eq. 506, 39 A. 2d 431 (1944), in support of her contention that she has been deprived of a "vested right". In each of those cases, however, the question was whether a stockholder could be deprived of his right to accummulated unpaid dividends on preferred stock by amendment under § 242. The precise decision in those cases was that the cancellation of the preferential right to be paid a dividend already accrued through the passage of time was not a mere charter amendment but an attempt to destroy a right in the nature of a matured debt.[5] *Goldman v. Postal Telegraph, Inc.*, 52 F. Supp. 763, 769 (D. Del. 1943).

Allen v. Francisco Sugar Co., 92 N. J. Eq. 431, 112 A. 887 (1921), on which appellant relies, is opposed to the holdings of the Delaware cases. The quotation from *Berger v. U. S. Steel Corp.*, 63 N. J. Eq. 809, 53 A. 68 (1902), which appears at 112 A. 889 indicates that the New Jersey Court in the *Allen* case drew a strict line of demarcation separating rights as between the state and the corporation from rights of the stockholders inter sese. In *Allen* the court held that the state's reserved power did not extend to a change in the contract of the stockholders inter sese. The question of constitutionality was never reached.

The judicial limitation on the New Jersey reserved power statute has been recognized by the authorities. 1

5. It is not necessary for the purposes of the present case to consider whether *Federal United Corporation v. Havender*, 24 Del. Ch. 318, 11 A. 2d 331 (1940), casts doubt upon the holdings in *Keller* and *Consolidated Film Industries*. See *Hottenstein v. York Ice Machinery Corp.*, 136 F. 2d 944, 950 (3d Cir. 1943). It appears to have been clear to Judge Biggs in *Hottenstein*, however, that the right to receive unpaid accumulated dividends on preferred stock was not a "vested" right entitled to constitutional protection.

Thompson, Corporation (3rd ed. 1927) § 434; 7 Fletcher, Cyclopedia of Corporations (perm. ed. 1931) § 3695; Meck, Accrued Dividends on Cumulative Preferred Stocks: The Legal Doctrine, 55 Harv. L. Rev. 71, 96 (1941).

The New Jersey doctrine, however, has never been adopted in Delaware, where it has been held that the reserved power of the state is all embracing and permits alterations in the contract between the stockholders themselves. Thus in *Hartford Accident & Indemnity Co. v. W. S. Dickey Clay Manufacturing Co.*, (Del. Supreme Ct. 1942) 26 Del. Ch. 411, 24 A. 2d 315 (1942), Chief Justice Layton said:

> "The contract rights of the shareholders, in the sense of interrelations inter sese, do not rest upon an unchangeable base, but are subject to alteration under the amendatory provisions of the General Law."

Goldman v. Postal Telegraph, Inc., supra, also shows that the Delaware courts take a much more liberal view than the New Jersey Courts as to the power of the state to alter the relative rights of the stockholders inter sese by subsequently enacted legislation. Judge Leahy said (52 F. Supp. 769):

> "It is clear on principle there can be no constitutional objections to the present amendment. Since the corporation is the creature of the state, and since the corporation law is a part of the corporate charter (Peters v. United States Mortgage Co., supra), it is self-evident the state has the right to reserve to itself, or a majority or more of the stockholders, the power to change the contract between the corporation and its stockholders or between its different classes of stockholders by an amendment to the charter after such contracts are made, even if a particular class of stockholders must suffer slightly."

The statute here under attack has been in force for forty years and there is no recorded decision to the effect

that it cannot constitutionally apply to corporations then in existence. Surely if that were an open question it would have been raised long before this, because the number of Delaware corporations created before 1917 must run into many thousands. It is evident that the commercial community as well as the Bar have accepted the statute as being applicable to all corporations.

While appellant claims that before the enactment of this statute the common law in effect in Delaware was to the effect that a corporation could not dispose of all its assets unless it has obtained the approval of all of the voting shareholders, except possibly in cases of insolvency or threat thereof, it is not settled that that was the common law of Delaware. While there is a dictum to that effect in *Butler v. New Keystone Copper Co.*, 10 Del. Ch. 371, 93 A. 380, 383 (1915), it was recognized that if the business were unprofitable and the enterprise hopeless or if the charter provisions so provided, the majority could sell all the property of the corporation even against the protest of a minority. Moreover, in *Allied Chemical & Dye Corp. v. Steel & Tube Co.*, 14 Del. Ch. 1, 11, 120 A. 486, 490 (1923), the court recognized the judicial tendency at common law to uphold the power of sale for any just and reasonable cause where there was no fraud or misconduct or overreaching on the part of the majority stockholders. See also 6A Fletcher, Cyclopedia Corporations (Perm. Ed.) § 2947; 1 Morawetz Corporations (Second Ed.) § 413.

There is a respectable body of authority to the effect that apart from statute a corporation may sell all of its assets and go out of business when authorized by the directors and the holders of a majority of the outstanding shares.

Beidenkopf v. Des Moines Life Insurance Co., 160 Iowa 629; 142 N. W. 434 (1913);

Treadwell v. Salisbury, 73 Mass. (7 Gray) 393, 404 (1856);

Paterson v. Shattuck Arizona Copper Co., 186 Minn. 611; 244 N. W. 281 (1932);
Bowditch v. Jackson Co., 76 New Hampshire 351, 355; 82 A. 1014 (1912);
Halpern v. Grabosky, 296 Pennsylvania 108; 145 A. 834 (1929);
Cohen v. Big Stone Gap Iron Co., 111 Va. 468; 69 S. E. 359 (1910);
E. H. Warren, Voluntary Transfers of Corporate Undertakings, 30 Harv. L. Rev. 335, 338 (1917).

Regardless of the common law rule on this subject, the legislature of Delaware under its reserved power had authority to lay down a statutory rule on this subject. It is apparent that appellant is merely complaining of an impairment of her voting rights, i.e., the power of a minority stockholder to veto a sale of corporate assets. But voting rights of shareholders of a corporation are a proper subject for legislative action, as applied to both existing and new corporations. For example, in *Looker v. Maynard*, 179 U. S. 46 (1900) a statute which gave shareholders the right to vote cumulatively was upheld as applicable to existing corporations, even though it deprived the majority of the shares of the power of electing the whole board, as cumulative voting permits proportional representation. In *Polk v. Mutual Reserve*, 207 U. S. 310 (1907), the law was changed to permit directors without shareholder approval to incorporate a mutual life association into a regular life insurance company.

In *Miller v. New York*, 82 U. S. 478, (1873), a statute was upheld which allowed the state to increase the number of state appointed directors on a Board of Directors of a railroad.

In *Sherman v. Smith*, 66 U. S, 587 (1861), the taking away of limited liability of shareholders was held not to be an impairment of contract.

In *Allen v. Ajax Mining Co.*, 30 Montana 490; 77 P. 47, (1904), the Supreme Court of Montana upheld a statute providing for the sale of all the corporate assets without approval of all the shareholders as being applicable to pre-existing corporations. The fact that the Montana statute provided for appraisal of the shares of dissenting stockholders does not distinguish the case, as the court stated that the reserved power of the state conferred power on the legislature to enact the statute.

In *Germer v. Triple-State Natural Gas & Oil Co.*, 60 W. Va. 143; 54 S. E. 509 (1906), the Supreme Court of West Va. upheld a similar statute.

CONCLUSION.

It is submitted that the appeal here filed by appellant should be dismissed for lack of jurisdiction, whether considered as an appeal under § 1257(2) or as a petition for writ of certiorari under § 2103 and § 1257(3).

Respectfully submitted,

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(p. 18 en blanc)

APPENDIX 1.

IN THE

SUPREME COURT OF DELAWARE

HELEN E. COTTRELL,
Plaintiff Below-Appellant,

v.

THE PAWCATUCK COMPANY (formerly the C. B. COTTRELL & SONS COMPANY), a Delaware Corporation (known as the Old Company), HARRIS-SEYBOLD COMPANY, a Delaware Corporation, DONALD C. COTTRELL, RIDLEY WATTS, ARTHUR M. COTTRELL, JR., CHARLES P. COTTRELL, JR., and THE COTTRELL COMPANY, a Delaware Corporation (known as the New Company),
Defendants Below-Appellees.

No. 14, 1956 Term

Appeal from the Court of Chancery in and for New Castle County

Petition of Appellant for Reargument.

The Plaintiff-Appellant respectfully requests the Supreme Court of the State of Delaware to review and reconsider (under Rule 13) its opinion of December 21, 1956. The reasons assigned are:

First, the Court's formula of evaluation—capitalization of earnings—was incorrectly applied. This formula based on capitalization of projected future earnings can properly

be applied only to the sale of an entire business. Although defendant Harris-Seybold purchased a "going concern" which had been making profits and continued to make profits after the change in ownership with no hiatus or stoppage, it purchased less than the entire corporate entity. A going concern normally includes both liabilities and assets, however, under the instant contract of sale, only the assets were purchased. It is respectfully submitted that the assets purchased, free from all liabilities, were of greater value than the entire corporate entity. This fact was overlooked in the Court's opinion (pp. 21 & 22).

Secondly, the Court in large measure hoped to avoid the difficult problem of evaluation presented by shifting reliance away from the appraisal report submitted by Plaintiff's expert, Ford, Bacon & Davis, to an almost complete reliance upon the majority judgment of the Board of Directors of the selling corporation. This reliance was apparently based primarily upon granting the defendant directors a complete presumption of good faith and good business judgment. We submit, however, that a sales price so low that even a single director, such as the plaintiff, would have been in a position to purchase the entire assets of the corporation which we do not need to point out were greater than the corporation's net worth as no liabilities were included, was a price so low as to shock the conscience of the Court.

This obvious fact was apparently obscured from this Court by reason of undue weight and unwarranted application of the presumption of legality of any action taken by a majority of a corporation's Board of Directors and stockholders. Furthermore, presentation of an accomplished sale seeking only ratification of the Board on November 19, 1953 was far different from a president taking the initiative as he might be normally expected to do. The unusual circumstances surrounding the majority groups purchase of stock only three years prior to the sale places

them in a different category from Plaintiff and other minority stockholders who have held stock through the years. It is submitted that the predominate weight of the facts presented in the record would show that the directors were motivated by the desire for quick capital gain, without any wish to continue the profitable family venture or to sell to the minority stockholders who in the normal course of events would assume control of the corporation upo Donald's death by purchase of the stock from Donald's estate or by purchase by the corporation directly of Donald's stock.

Plaintiff wishes to point out that any cleavage between the majority and minority stemmed from the failure to pay adequate dividends and to hire members of the minority or their representative to any key management position to be trained to replace Donald upon his death. There is nothing in the record to show that the majority group had an aggressive alert approach to the future or were seeking to expand into the offset field if this were deemed advisable. The failure to pay adequate dividends through the years cannot be excused by inability to pay, as the corporation had a large accumulation of excess cash and securities. At the time of sale the Ford, Bacon and Davis report shows the excess of such assets over the above normal working capital needs of the company to be, $1,700,000 (AII, p. 36).

Thirdly, the Court erred in failing to pass upon the constitutionality of the 1917 Delaware Statute which Plaintiff submits could not be retroactive in its application to the instant corporation formed in 1914. The illegality of the sale for the failure to obtain one hundred per cent stockholders consent goes to the heart of the matter and does not raise any new or collateral issues. Under the theory of Plaintiff, urged particularly in the reply brief in the trial court, the corporation was in reality a joint family partnership venture and should be considered as such by an equity court. The constitutional argument advanced

on appeal merely supports this point. Under partnership law those partners wishing to terminate the business venture are required to first offer the assets for sale to the remaining partners.

• • •

The above reasons are more fully outlined below.

1. Use By the Court of the Principal of Capitalizing Earnings to Determine Value is Incomplete.

• • •

2. Plaintiff Should Not Be Denied the Right to Raise the Constitutional Question Here for the First Time on This Appeal.

This Court declined to consider the constitutional question on the basis that it had not been fairly raised in the Court below.

It distinguished *Rickards v. State,* 45 Del. 573, 77 A. 2 199, in which two exceptions to the general rule were noted, *viz.*: 1) where the jurisdiction of the Court was in question; and 2) in cases of public policy.

In *Rickards v. State,* the Court did not decide that the constitutional question was fairly presented to the trial judge, but to the contrary held:

> "• • • We further think the question presented to us was not fairly presented below, nor were the usual exceptions made to preserve the defendant's right to raise the question by Writ of Error" 77 A. 2 202.

The Court has thus decided to limit the *Rickards* rule to that of a criminal action where a constitutional question is involved, but there seems no compelling reason so to do where here there is a subtantial minority rights question which goes to the very heart of this case.

When the point is one of law, not at all dependent on facts that might have been presented below had the point there been raised, and both parties have briefed the point, there is no compelling reason why constitutionality may not be considered although not raised below.

4 C. J. S., Appeal and Error, Sec. 240, p. 462;
12 C. J., Const. Law, Sec. 217, (3) p. 786;
Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 751, 7 S. Ct. 757, 759, 30 L. Ed. 825, 827;
Stierle v. Rohmeyer, 218 Wis. 149, 260 N. W. 647 (Sup. Wis. 1935);
Cappon v. O'Day,—Wis.—, 162 N. W. 655 (Sup. Wis. 1917);
Shaffer Oil & Refining Co. v. County Treasurer, —Okl.—, 52 P. 2, 78 (Sup. Okl. 1935);
McCabe v. Maysville, etc. R. Co., 136 Ky. 674, 124 Ky. 892 (Ct. Appeal, Ky. 1910);
Shaw v. Woodruff,—Tenn.—, 35 S. W. 2, 167 (Sup. Tenn. 1928);
Kansas City Power & Light Co. v. Town of Carrollton, 346. Mo 802, 142 S. W. 2, 849 (Sup. Miss. 1940);
Matthew v. Bailey, 198 Ark. 830, 131 S. W. 2, 425 (Sup. Ark. 1939);
Galli v. Brown, 110 C. A. 2d 764, 243 P. 2, 920 (Dist. Ct. Appeals Cal. 1952);
People v. Railway Mail Mut. Benefit Ass'n, 371 Ill. 102, 20 N. E. 2, 91 (Sup. Ill. 1939).

In *12 C. J., supra*, it is said:

"By way of exception to the general rule, however, it is the duty of a court to pass on a constitutional question, even if raised for the first time on appeal, if it appears that a determination of the question is necessary to a decision of the case."

In *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 751, 7 S. Ct. 757, 759, 30 L. Ed. 825, 827, the Court said:

> "A mere error of law, may be considered for the first time on appeal if it involves a controlling legal principle or statute which, with respect to undisputed facts, the courts are judicially bound to know. Failure to present to the trial court that of which it is charged with judicial knowledge does not preclude its consideration for the first time upon appeal."

In the *Cappon* case, *supra*, the Wisconsin Supreme Court said:

> "We cannot agree with this contention. This court sits here to do justice between litigants. For the purpose of orderly administration, and the attainment of justice, certain rules are established. Any rule the enforcement of which results in a failure of justice should be carefully scrutinized and not blindly adhered to unless the abandonment of it will work more injustice than will follow if it be adhered to. One of the rules of well-nigh universal application established by courts in the administration of the law is that questions not raised and properly presented for review in the trial court will not be reviewed on appeal. 6 C. J. 689. The reason for the rule is plain. If the question had been raised below, the situation might have been met by the opposite party by way of amendment or of additional proof. In such circumstances, therefore, for the appellate court to take up and decide on an incomplete record questions raised before it for the first time would, in many instances at least, result in great injustice, and for that reason appellate courts ordinarily decline to review questions raised for the first time in the appellate court. But to this rule there are many exceptions. Questions as to the jurisdiction of the court may be raised. Telford v. City of Ashland,

100 Wis. 238, 75 N. Q. 1006. Questions as to the legal effect of a deed or other instrument may be raised for the first time in this court (cases). There are numerous other exceptions." 3 C. J. 740. (162 N. W. p. 657).

In the *Stierle* case, *supra,* Justice Fowler speaking for the Supreme Court of Wisconsin in a case involving property rights under the due process clause of the federal Constitution said:

"It is also urged that as the unconstitutionality of the provisions was not raised in the court below, it will not be considered here. This is a general rule, but it is sometimes 'more honored in the breach than in the observance' (cases). Whether the court will consider a point not raised below 'depends upon the facts and circumstances of the particular case.' (Cappon v. O'Day, supra, paragraph 2 of the syllabus. When the point is one of law, not at all dependent on facts that might have been presented below had the point been there raised, no compelling reason is perceived why it may not be considered on review, and no reason is perceived why the constitutionality of the provision here involved should not be now considered and decided. The point has been fully and very ably briefed by counsel on both sides by direction of the court, and nothing more could possibly have been presented below than has been presented here." (260 N. W. 654.)

In *Shaw v. Woodruff, supra,* it was held that generally, a constitutional question may be raised at any time. The Court, 2 S. W. 2 at page 168 said:

"But even courts of equity are without power to prescribe and enforce rules that conflict with or are repugnant to the Constitution."

In *Kansas City Power & Light Co. v. Town of Carrollton, supra,* the Court allowed the question to be raised,

although not in the pleadings, where it had been argued by both parties.

In *Matthews v. Bailey, supra,* the Court held that it was proper to raise the question for the first time on appeal especially where the question had been fully briefed.

3. No presumption of Good Faith Should Be Allowed.

Because of the unusual circumstances surrounding Donald's purchase of stock in 1950 it can only be assumed that he was interested primarily in merger or resale not in continuing the profitable family venture. It did not lie with Donald to criticize family businesses as he reaped all the benefits of buying at the family price of $100 a share after working in the company as an employee for 20 years. Because of reasons of age and health Donald was motivated by a desire for a quick capital gain and also to cut the minority off from obtaining control of the company on his death. These factors we submit are such as to prevent the application of the normal presumption of good faith to Donald and other majority directors under his influence and control.

Under such circumstances, the approach here differs little in essence from the holding in *Allied Chemical & Dye Corporation v. Steel & Tube Company,* 14 Del. Ch. 1, 120 A. 486.

Respectfully submitted,

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Certification.

It is hereby certified by counsel that the above petition for rehearing is presented in good faith and not for delay.

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